Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees	)	**WT Docket No. 96-148**
	)	
Implementation of Section 257 of the Communications Act — Elimination of Market Entry Barriers	)	**GN Docket No. 96-113**

To: The Commission

COMMENTS OF THE RURAL TELECOMMUNICATIONS GROUP IN SUPPORT OF PETITION FOR RECONSIDERATION

The Rural Telecommunications Group ("RTG"), by its attorneys, respectfully submits these comments in support of the Petition for Reconsideration ("Petition") filed by the National Telephone Cooperative Association and the Independent Alliance (collectively "NTCA/IA") in response to the Federal Communications Commission's ("FCC" or "Commission") *Report and Order and Further Notice of Proposed Rulemaking* in WT Docket No. 96-148.[1]

With these comments, RTG supports NTCA/IA and adopts by reference the arguments contained in the Petition. RTG also offers a method by which the Commission and PCS auction winners, with a minimum of effort, could administer a limited right of first refusal for

[1] *In re* Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees — Implementation of Section 257 of the Communications Act — Elimination of Market Entry Barriers, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 96-148, GN Docket No. 96-113, (released Dec. 20, 1996)("*R&O and FNPRM*").

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rural telephone companies in partitioning arrangements. Finally, RTG adopts by reference the arguments made in its Motion for Stay Pending Judicial Review filed February 20, 1997 in the above referenced proceeding.[2]

DISCUSSION

The Commission Cannot Adopt Liberalized Partitioning Rules Without Making a Concession for Rural Telephone Companies

NTCA/IA states the verity that rural telephone companies have been repeating throughout this proceeding -- that "[i]n changing its rules to allow entities other than rural telcos the opportunity to acquire spectrum through partitioning, the Commission has abandoned its implementation of a direct Congressional mandate to provide opportunities for rural telcos to provide PCS services."[3] RTG completely agrees with NTCA/IA that the Commission's decision to eliminate the rural telephone company exclusive partitioning scheme <u>after</u> the auction process was over is arbitrary and capricious and inadequately justified.[4]

As NTCA/IA accurately points out, Congress directed the Commission to specifically ensure that "rural telephone companies," among other entities, "are <u>given</u>" the opportunity to participate in spectrum-based services, such as personal communications services ("PCS").[5]

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[2] RTG also filed a Petition for Review of the *R&O and FNPRM* in the United States Court of Appeals for the District of Columbia Circuit on February 5, 1997. *See, Rural Telecommunications Group v. Federal Communications Commission, et. al.*, Case No. 97-1077 (D.C. Cir. filed Feb. 5, 1997).

[3] Petition at 2.

[4] *Id.*

[5] Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, Title VI, § 6002, 107 Stat. 312, 388 (emphasis added).

Entities such as women, minorities and small businesses with earnings and assets below a set limit were "given" bidding credits, reduced upfront and down payments, and "interest-only" installment payment plans to encourage and assist their participation in the PCS auctions.[6] Rural telephone companies were "given" one solitary preference — the exclusive privilege of partitioning from a Basic Trading Area ("BTA") or Major Trading Area ("MTA") license enough geographic territory to enable them to provide PCS to their existing wireline service areas.[7] This privilege was the center of a logical scheme to ensure that the inhabitants of rural America receive PCS as rapidly and reliably as their urban counterparts. The Commission's stated rationale for its decision to implement the partitioning plan was that it would "encourage rural telephone companies to take advantage of existing infrastructure in providing PCS services, thereby speeding service to rural areas."[8] The Commission also maintained that the partitioning rule satisfied Congress's directive that rural telephone companies be ensured an opportunity to provide spectrum-based services.[9] On the basis of this "narrowly tailored" rule, rural telephone companies made business plans that committed available capital to obtain PCS spectrum by partitioning with auction winners in lieu of the more expensive and uncertain option of attempting to obtain such spectrum at auction.

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[6] *See In re* Implementation of Section 309(j) of the Communications Act — Competitive Bidding, *Fifth Report and Order,* 9 FCC Rcd. 5532, 5597-99 (1994)("*Fifth R&O*").

[7] *Id.*

[8] *Id.* at 5598.

[9] *In re* Implementation of Section 309(j) of the Communications Act — Competitive Bidding, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd. 403, ¶ 153 (1994)("*Fifth MO&O*").

In view of the background, NTCA/IA has appropriately asked the Commission to reconsider its unjustified decision to eliminate the rural telephone company partitioning scheme well beyond a point in time where rural telephone companies could have feasibly implemented alternative plans for the acquisition of PCS spectrum to serve their rural service areas.[10] RTG agrees with NTCA/IA that rural telephone companies relied to their detriment on the Commission's assurance that PCS opportunities would be available through partitioning.[11] The Commission itself has recognized that partitioning may be the only viable option for some rural telephone companies to obtain spectrum to provide PCS to their rural communities. NTCA/IA uses the Commission's owns words when it states:

> partitioning of rural areas served by rural telephone companies provides a viable opportunity for many of these designated entities who desire to offer PCS . . . [R]ural telephone companies who cannot afford or do not desire to bid for or construct PCS systems for an entire BTA can thus acquire licenses in areas they wish to serve . . ..[12]

NTCA/IA also reminds the Commission that rural telephone companies "are [not] able to take advantage of the special provisions for small businesses [the Commission] designed in [its] auction rules,"[13] <u>because "the new rules were adopted fully 20 weeks after the deadline for participation in the last broadband PCS auction</u> . . .![14] As NTCA/IA asserts, the new rules provide "no mechanism that promotes the participation of rural telcos in the provision of

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[10] Petition at 6-8.

[11] *Id.* at 6.

[12] *Id.* (quoting *Fifth R&O* at ¶ 152).

[13] *R&O and FNPRM* at ¶ 15.

[14] Petition at 8 (emphasis added).

PCS," and therefore must be reconsidered.[15] Liberalizing the partitioning rules ignores the statutory mandate to provide rural telephone companies with an assurance of PCS participation, and should the Commission refuse to reinstate the original partitioning scheme, it must adopt an alternative mechanism for rural telephone companies in order to remain in compliance with the Communications Act of 1934.

The Commission Should Reconsider the Right of First Refusal

In the event that the Commission declines to reinstate its original partitioning policy, the Commission should at least create a limited right of first refusal for rural telephone companies as an alternative to exclusive partitioning. While RTG does not believe that a right of first refusal is sufficient to fully satisfy the obligations of Section 309(j), it nevertheless expands partitioning eligibility while reducing the adverse impact on the opportunity for rural telephone companies to provide spectrum-based services to rural areas. As NTCA/IA concluded, such an alternative can "address both expanded partitioning rights and the mandate of Section 309(j) to provide opportunities for rural telcos."[16]

In the course of the broadband PCS partitioning proceeding, a number of parties advocated allowing rural telephone companies a right of first refusal to acquire a partitioned license in the geographic area that they currently serve.[17] In the *R&O and FNPRM,* the

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[15] *Id.* at 9.

[16] *Id.* at 10.

[17] *See* Comments of the United States Telephone Association ("USTA") at 3; Comments of the Rural Cellular Association ("RCA") at 4; Comments of NTCA at 6; Reply Comments of RTG at 6-7; Comments of Illuminet at 7-8 (in response to *In re* Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees — Implementation of Section 257 of the Communications Act — Elimination of Market Entry

Commission rejected a right of first refusal based upon a clear misunderstanding of how rural telcos envisioned the right of first refusal mechanism working. The Commission concluded, without basis, that granting a right of first refusal to rural telephone companies would limit the number of parties that could obtain partitioned PCS licenses thereby frustrating the Commission's goals of encouraging participation by many entities and of reducing barriers to entry.[18] The Commission also found that the right of first refusal would be difficult to administer and could discourage partitioning.[19] As RTG will explain, the right of first refusal mechanism can be crafted to avoid both of these concerns. Accordingly, the Commission should reconsider its rejection of the right in view of the following clarification.

RTG proposes that the Commission appoint a privately-operated clearinghouse for PCS partitioning data. Both the National Rural Telecommunications Cooperative ("NRTC") and the Industrial Telecommunications Association ("ITA") have registered their interest in serving as a potential clearinghouse.[20] Additionally, RTG would consider taking on this role. Once the Commission establishes a clearinghouse, rural telephone companies would have the responsibility of registering their interest in partitioning a PCS license, and describing their requested territory, by a certain date. The clearinghouse would ensure that there were no overlapping areas among rural telephone companies by establishing guidelines for registering the rural telephone companies' service areas and resolving any disputes. The clearinghouse

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Barriers, *Notice of Proposed Rulemaking*, WT Docket No. 96-148, GN Docket No. 96-113 (released July 15, 1996).

[18] *R&O and FNPRM* at ¶ 17.

[19] *Id.* at ¶ 18.

[20] *Id.* at ¶ 91.

would also ensure that the rural telephone companies' partitioned territory is no larger than two times the population of the rural telephone companies' existing wireline service area.

PCS licensees seeking to geographically partition an area would then check with the clearinghouse to determine if the area sought to be partitioned was registered to any rural telephone company. If a rural telephone company registered a partitioning interest with the clearinghouse, the PCS licensee would be on notice and might choose to approach the rural telephone company first to negotiate a partitioning agreement for the rural telephone company's service area, or for a larger geographic area. Alternatively, the PCS licensee would be free to negotiate with any eligible entity as allowed by the new rule. However, once the parties reach an agreement, the PCS licensee would give notice to the registered rural telephone company or companies whose service areas would be affected. The rural telephone company would then have 30 days to accept or reject a partitioning deal on similar terms.[21] Once a PCS licensee partitions an area, subsequent assignees of the PCS license would not be required to extend a second right of first refusal if the clearinghouse database indicates that the rural telephone company already exercised or rejected its right of first refusal. Similarly, PCS licensees would not be required to offer a right of first refusal to a rural telephone company that already held 45 MHz of commercial mobile radio services ("CMRS") spectrum in their wireline service area.

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[21] If the proposed partitioning deal exceeded an area reasonably related to the rural telephone company's wireline service area, the rural telephone company could exercise its right by paying a pro rata share of the purchase price based on the population in the rural area. This limited partitioning right would neither be difficult to administer nor disruptive of large partitioning/assignment deals which are generally valued on a per population basis. Similarly, if a partitioning deal covered the service areas of more than one rural telephone company, each rural telephone company would have 30 days to exercise its right to pay a pro rata share of the deal. Such a short waiting period would not seriously disrupt a large partitioning deal.

The Commission's conclusion that a right of first refusal would limit the number of parties that could obtain partitioned PCS licenses is simply not correct. The right of first refusal could be crafted such that any entity could partition an area, including the wireline service area of a rural telco, once the rural telephone company had rejected or exercised its right. Similarly, any entity could partition an area outside a rural telephone companies' territory at any time. All entities would be eligible to obtain a partitioned license, and a right of first refusal would in no way limit the total number of businesses that could acquire a PCS license. Additionally, a requirement that a small business seeking to obtain a partitioned PCS license first check with a clearinghouse and contact a rural telephone company to determine if any rural area potentially needs to be carved out of the partitioned area cannot be considered a barrier to entry.

As described above, a right of first refusal need not be difficult to administer nor would it discourage partitioning. As is the case with many facets of FCC regulation, the lion's share of administration could be left to the licensees and the clearinghouse. Licensees and the Commission regularly deal with complex issues and complex business dealings. For example, the Commission's microwave relocation rules, requiring PCS licensees to negotiate with incumbent private operational fixed microwave service licensees to relocate them to other spectrum, are far more burdensome to a PCS licensee than a limited right of first refusal.[22] Moreover, business people routinely face rights or first refusal in various contracts.

[22] Amendment to the FCC's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95-157, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8825 (1996). Unlike partitioning, a PCS licensee is required to negotiate with an incumbent microwave licensee. Moreover, these negotiations are far more complex than those associated with partitioning. Incumbent microwave systems often traverse the boundaries of multiple PCS license areas, and PCS licensees face the prospect of negotiating with multiple incumbent microwave licensees.

PCS licensees would be on notice and would negotiate any partitioning deals with the right in mind -- possibly bringing the rural telephone company into the negotiations on the front end. From a business perspective, this certainly should be far preferable to a PCS licensee than the uncertain litigation it currently faces as a result of RTG's lawsuit or is likely to face in the form of individual protests to specific partitioning proposals brought to the FCC for approval.

In the *R&O and FNPRM,* the Commission was concerned that parties might not be able to separate out a partitioning deal from a larger assignment and that a right of first refusal might therefor prevent the consummation of a large assignment. This need not be the case at all. First, as noted above, a rural telephone company could pay a pro rata share based on population for any "carved out" partitioned area.[23] Second, parties to large assignments might bring rural telephone companies in on negotiation on the front end. This result is clearly desirable under Section 309(j).

The right of first refusal plan would at least give rural telephone companies one clear shot at obtaining PCS spectrum to serve their communities. Without it, rural telephone companies will be forced to compete against large, wealthy entities that are able to negotiate for much larger geographic areas than what a rural telephone company seeks to serve. If the more than 800 rural telephone companies in existence were able to successfully outbid deep-pocketed businesses, more would have taken their chances in the PCS auction, regardless of the partitioning scheme. The fact that most rural telephone companies did not partake in the auction should speak volumes about their ability to financially compete with larger entities, and explains why they relied so heavily upon the exclusive partitioning scheme.

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[23] In the case of a license swap, the parties could obtain three estimates to determine the fair market value of the PCS partitioned area and the rural telephone company could pay a pro rata share of this value. Such appraisals are routine, and not difficult to obtain.

CONCLUSION

RTG supports NTCA/IA in its contention that the Commission must reconsider its decision to liberalize partitioning. The rules imposed by the *R&O and FNPRM* "ignore without foundation or support prior Commission factual and legal findings, and result in the establishment of new policy that ignores the Congressional mandate to provide rural telcos with specific opportunities to participate in the provision of PCS services."[24] In order to withstand judicial scrutiny, the Commission must provide some opportunity to rural telephone companies, as Congress required, and at a minimum should implement a right of first refusal as described herein.

For the forgoing reasons, RTG respectfully requests that the Commission grant NTCA/IA's request and reinstate the original partitioning scheme. In the alternative, RTG requests that the Commission modify its *R&O and FNPRM* and adopt a right of first refusal for rural telephone companies.

Respectfully submitted,

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[24] Petition at 9.

CERTIFICATE OF SERVICE

I, Jacqueline Jenkins, an employee in the law firm of Bennet & Bennet, PLLC, hereby certify that a copy of the foregoing Comments in Support of Petition for Reconsideration has been served on the following via first-class, postage pre-paid U.S. mail, this 26th day of March 1997:

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